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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-362

WESTERN WATERPROOFING CO., INC.,
Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,

and

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Western Waterproofing Co., Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit finally entered in this proceeding on June 2, 1978, when the timely Petition of Western Waterproofing Co., Inc. For Rehearing And Suggestion That Such Rehearing Be By The Court In Banc was overruled.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 576 F.2d 139 (8th Cir. 1978) and appears as Appendix

A. The order and opinion of Occupational Safety and Health Review Commission is reported at CCH 1977-1978 OSHD ¶21,572 and appears as Appendix B. The order and opinion of the Administrative Law Judge is reported at CCH 1975-1976 OSHD ¶19,925 and appears as Appendix C.

JURISDICTION

The opinion of the Court of Appeals was filed on May 9, 1978 and Petitioner Western timely filed its petition for rehearing. The petition was overruled by the Court of Appeals on June 2, 1978 and this Petition For A Writ Of Certiorari is filed within ninety (90) days of the entry of the judgment of the Court of Appeals on June 2, 1978. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the definition of a "willful" violation of the Occupational Safety and Health Act of 1970 (Act), which is prescribed by the Court of Appeals for the Eighth Circuit but which is contrary to and inconsistent with the proper definition pronounced by the Third Circuit should be permitted to stand.

STATUTORY PROVISIONS INVOLVED

Section 17(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 666(a) (1970), is the statutory provision involved and Section 17 of the Act is reprinted as Appendix D.

STATEMENT OF THE CASE

Petitioner is a construction contractor whose construction jobsite was inspected on July 11, 1974 by a representative of the Secretary of Labor. As a result of that inspection, on July 17, 1974, the Secretary of Labor notwithstanding the undisputed fact that the inspecting representative of the Secretary of Labor did not recommend that a willful violation be issued, issued a citation for a willful violation of a combination of three separate safety regulations together with a proposed penalty in the amount of $9,000.00 and a citation for two other than serious violations, one with a proposed penalty of $90.00 and one with no proposed penalty.[1] The citations respectively commanded that the conditions constituting the alleged willful violation be abated "Immediately" and that the conditions constituting the two alleged other than serious violations be abated by July 25, 1974.

Petitioner Western, under and pursuant to Section 10 of the Act, timely filed its Notice of Contest. Thereafter, on August 14, 1974, the Secretary filed a Complaint with the Occupational Safety and Health Review Commission and Petitioner Western timely filed its Answer on August 22, 1974 generally denying any violation of the

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1. The Secretary's citation alleged one willful violation of the Act for failure by Petitioner Western to comply with the requirements of the three safety regulations published at: 29 CFR 1926.451(i)(8); 29 CFR 1926.451(i)(9); and 29 CFR 1926.-451(a)(4) and proposed a $9,000.00 penalty for violation. Additionally, the Secretary cited Western for two other than serious violations—one for not complying with the safety regulations published at 29 CFR 1926.150(a)(1) and the other for not complying with the safety regulations published at 29 CFR 1926.251 (c)(5)(1). A $90.00 penalty was proposed for the former other than serious violation and no penalty was proposed for the latter which was later dismissed by the Secretary for lack of evidence to support the charge. The regulations purportedly violated by Petitioner Western and constituting the alleged willful violation appear as Appendix E.

Act and asserting various affirmative defenses to the Complaint.

On February 25, 1975, a hearing was held before an Administrative Law Judge employed by the Occupational Safety and Health Review Commission. Subsequent to the hearing and the filing by Petitioner Western and the Secretary of their separate proposed Findings Of Fact, Conclusions Of Law and Briefs, the Administrative Law Judge rendered his opinion and order affirming both the willful violation and the one remaining other than serious violation as charged together with the proposed penalties of $9,000.00 and $90.00. In accordance with the Act, Petitioner Western petitioned the Review Commission to review the opinion and order of the Administrative Law Judge and Commissioners Moran and Cleary separately directed it for review. On February 24, 1977, the Review Commission issued its opinion and order which affirmed part of the Administrative Law Judge's opinion and order and modified other parts; Commissioner Moran filed his opinion which dissented in part and concurred in part.[2]

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2. The Review Commission's opinion and order affirmed non-compliance by Western with the safety regulations published at 29 CFR 1926.451(i)(8) and 29 CFR 1926.451(i)(9) as constituting a willful violation of the Act. It modified the Administrative Law Judge's opinion and order, which included non-compliance with the safety regulation published at 29 CFR 1926.451(a)(4) in the willful violation and instead amended the Citation and Complaint to charge non-compliance by Western with the safety regulation published at 29 CFR 1926.451(i)(11) as part of the willful violation. This regulation also appears in Appendix E. The opinion and order also affirmed the $9,000.00 penalty and the other than serious violation with its $90.00 penalty. Commissioner Moran's dissenting opinion found no non-compliance by Petitioner Western with the safety regulation published at 29 CFR 1926.451(i)(8): Furthermore, he would have affirmed only an other than serious violation for non-compliance with the safety regulation published at 29 CFR 1926.451(i)(9) and a serious violation for non-compliance with the safety regulation published at 29 CFR 1926.451(a)(4) while stating that the Review Commission's amendment of the Citation and Complaint to charge a violation of the safety regulation published at 29 CFR 1926.451(i)(11) was improper.

Pursuant to Section 11 of the Act, Petitioner Western, a resident of the territorial jurisdiction of the Eighth Circuit, timely filed a Petition for Review of the Review Commission's final order.

On May 9, 1978, the Eighth Circuit filed its opinion affirming in part and reversing in part the opinion and order of the Review Commission.[3] The Petition Of Western Waterproofing Co., Inc. For Rehearing And Suggestion That Such Rehearing Be By The Court In Banc was timely filed and on June 2, 1978, the Court of Appeals issued its order denying such rehearing.

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3. The Court of Appeals affirmed non-compliance with the safety regulations published at 29 CFR 1926.451(i)(8) and 29 CFR 1926.451(i)(9) as constituting a willful violation; however, it reversed the Review Commission's order amending the Citation and Complaint to charge a violation of the safety regulation published at 29 CFR 1926.451(i)(11) and instead found non-compliance with a portion of the safety regulation published at 29 CFR 1926.451(a)(4) as part of the willful violation. It remanded the case to the Review Commission for further consideration of a proper penalty.

REASON FOR GRANTING THE WRIT

There Is a Serious Conflict Between the Definition of a "Willful" Violation of the Act As Prescribed by the Circuit Court of Appeals for the Eighth Circuit and the Correct Definition Earlier Pronounced by the Circuit Court of Appeals for the Third Circuit.

The Court below has erroneously interpreted the meaning of a "willful" violation of the Act and, in so doing, has applied the wrong standard to determine the character of this Petitioner's conduct under the Act. Instead of analyzing the Act, which does not define a "willful" violation, the Court below disregards the gradations in the classes of violation of the Act which were obviously intended by Congress and merely stated that it was in accord with the views expressed by the Fourth, Tenth and First Circuits. Those opinions of the Fourth, Tenth and First Circuits also lack any analysis of the penalty scheme of the Act. The definition accepted by the Court below is that when an employer acts voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act, the employer is in willful violation of the Act. In accepting such a definition, the Court below specifically rejected the correct definition pronounced by the Third Circuit in *Frank J. Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200 (3d Cir. 1974), aff'd en banc, 519 F.2d 1215 (3d Cir. 1975), aff'd on other grounds, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977). In *Irey*, the Third Circuit concluded after its perceptive analysis of the Act that:

> "Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. *Willful means more than merely voluntary action or - it involves an element of obstinate refusal to comply.*" Id. at 1207. (Emphasis added).

The Court below in prescribing its own definition of "willful" and in rejecting the Third Circuit's definition gave great deference to the interpretation of the Act by the Review Commission and the Secretary of Labor, both of whom have interpreted a willful violation to be "an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements". *General Electric Co.*, CCH 1977-1978 OSHD ¶21,853 (1977); *Kent Nowlin Construction, Inc.*, CCH 1977-1978 OSHD ¶21,550 (1977); *Williams Enterprises, Inc.*, CCH 1976-1977 OSHD ¶21,071 (1976). In basing its definition of "willful" on these cases decided by the Review Commission and on the other cases decided by the Fourth, Tenth and First Circuits, the Court below fails to recognize that those opinions are totally devoid of any rationale geared to maintain the different gradations of violations established by Congress and set forth in the Act.

The First Circuit's decision in *F. X. Messina Construction Corp.* v. *OSHRC*, 505 F.2d 701 (1st Cir. 1974) does not even recognize or acknowledge any differences between a willful violation of the Act and a serious violation of the Act. It merely states:

> "Petitioner, through its foremen, made its choice, a conscious, intentional, deliberate, voluntary decision, which, regardless of a venial motive, properly is described as willful." Id. at 702.

Similar to both the First Circuit's decision and now the Eighth Circuit's, the Fourth Circuit in *Intercounty Construction Company* v. *OSHRC*, 522 F.2d 777 (4th Cir. 1975), merely accords ". . . great deference to the interpretation

given the statute by the officers or agency charged with its administration". Id. at 779. The Fourth Circuit states that—with respect to a violation of the Act—willfulness is used in the mere cognitive sense of a civil statute; therefore, it is unnecessary to find a "bad purpose" or "obstinate refusal to comply". Thus, the Fourth Circuit concludes that requiring a finding of "bad intent" would severely restrict the use by the Occupational Safety and Health Administration of the stronger sanctions for a willful violation in enforcing the Act. Such an approach obviously disregards the criminal penalties prescribed by the Act in the event of a death as a result of a willful violation [Section 17(e) of the Act] and liberally allows identical bases for holding an employer either in serious or willful violation—evidently depending only on the whim of the agent handling the matter and on the fine the agency unilaterally determines to levy. The definitions espoused by those Circuits which conflict with the Third Circuit allow the desk-bound representative of the Secretary to disregard, as he did in this case, the observations of the inspecting representative of the Secretary. This representative, after observing the project, the attitudes of the employer and the nature of the work at the job site, did not recommend the issuance of a willful citation.

The Third Circuit in *Frank J. Irey, Jr., Inc.* v. *OSHRC*, supra, first analyzed the Act to establish the proper definition of a "willful" violation. As stated by the Third Circuit, there are four categories into which violations fall:

1. De minimis, where no monetary penalty is invoked;

2. Non-serious (other than serious), where penalties of up to $1,000 may be assessed;

3. Serious violations, defined as those which create a substantial probability of death or serious physical harm, where a mandatory penalty of up to $1,000 is provided; and,

4. Willful or repeated violations, where a civil penalty of up to $10,000 may be assessed.

The Third Circuit acknowledged that a "willful" violation is not defined by the Act and that Circuit recognized that the Review Commission's interpretation was not even unanimous.[4] Accordingly, under these circumstances, it utilized the different penalties allowable for assessment to determine that a "willful" violation was obviously meant by Congress to deal with a more flagrant type of conduct than that of a serious violation. Therefore, the Third Circuit concluded that a "willful" violation constitutes more than merely a voluntary action or omission, but rather it must involve an element of obstinate refusal to comply with the safety standards. As stated by the Third Circuit, this "restrictive definition" is not only appropriate but is necessary to maintain the distinction between a "serious" violation and a "willful" violation. The gradations of violations established by the penalty structure of the Act are disrupted by any definition that permits the agency to assess a higher penalty than is actually authorized for conduct which is defined by the Act as a "serious" violation. This, however, is the result of the definition of "willful" prescribed by the Court below.

Because the Court below ignored the definition established by the Third Circuit in *Irey* and adopted the definition espoused by the Review Commission and the Secretary of Labor, Western has been held in "willful" violation of the Act even though:

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4. Commissioner Moran dissented in those Review Commission decisions establishing the definition of "willful."

1. It, in good faith, believed that its system of suspending its scaffold from the building, which system included tying the suspension cables of the scaffolds to the building, constituted "lashing" in accordance with the requirements of the standard published at 29 CFR 1926.451 (i)(9). The basis for such a conclusion by this Petitioner was that the purpose of the safety standard was to prevent lateral sway and Petitioner through the years had used a scaffold with a suspension system which served the dual purpose of suspending the scaffolds and lashing them to the building while at the same time preventing lateral sway of the scaffold as required by the safety standard.

2. Western had a company-wide safety policy which required all employees working on scaffolds to use safety belts and to tie off to lifelines. The employee of Western temporarily running the job the day of the inspection had always followed the safety policies in the past. His superior came by the job site the first thing the morning of the inspection and was assured by that employee that no work would proceed that day without rigging lifelines and enforcing the company's rule requiring the use of safety belts.

3. In good faith, Western believed that it was providing the safest possible scaffold by eliminating the toeboards which caused an undue accumulation of the material resulting from the sandblasting operation. The avowed purpose of toeboards is to keep tools from being kicked off a scaffold onto employees below. On this jobsite, no employees were working below and no tools were on the deck of the scaffolds which could be kicked off. Thus any hazards to employees were minimized further when the toeboards were eliminated while Western was sandblasting.

Although the underlying purpose of the Act is to provide a safe workplace for employees, the Court below

specifically states that it does not matter whether or not Western, in good faith, believed that it had provided a safe workplace for employees and that the conditions of the job site complied with the underlying purpose of the standards allegedly violated and the Act itself. The Court below considered only that in the opinion of the Secretary of Labor and the Review Commission Western had violated the standards cited and the violation was "willful". By such an attitude, the Court below became merely a rubber stamp for this administrative agency rather than exercising the judicial function imposed on it by the Federal Rules.

It is incumbent upon this Court to resolve the conflicting definitions of "willful" espoused by the various Circuit Courts of Appeal. In this case, it is doubly important that the definition of "willful" be identical in all circuits so that there can be a uniformity in the treatment of those charged with a "willful" violation of the Act.

CONCLUSION

Wherefore, for the reason set forth above, it is urged that a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Eighth Circuit so that this yet unresolved significant question under the Occupational Safety and Health Act is finally decided.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1324

Western Waterproofing Co., Inc.,
Petitioner,

v.

Ray Marshall, Secretary of Labor, and Occupational Safety and Health Review Commission,
Respondents.

On Petition to Review an Order of the Occupational Safety and Health Review Commission

Submitted: January 10, 1978
Filed: May 9, 1978

Before BRIGHT, STEPHENSON and HENLEY, Circuit Judges.

STEPHENSON, Circuit Judge.

Appellant, Western Waterproofing Co., Inc. (Western), appeals from an Occupational Safety and Health Review Commission (Review Commission) decision finding West-

ern in willful violation of the Occupational Safety and Health Act of 1970[1] (Act).[2] In substance, the Review Commission found that Western had willfully failed to comply with construction safety standards requiring employees to be protected by approved safety belts attached to lifelines when working on two-point suspension scaffolds,[3] requiring such scaffolds to be securely lashed to the building,[4] and requiring such scaffolds to be equipped with toeboards and midrails.[5]

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1. 29 U.S.C. § 651 et seq.

2. Western also appeals from the Review Commission's finding of a nonserious violation of the construction fire protection standard, 29 C.F.R. § 1926.150(a)(1) and a corresponding $90 penalty. A careful review of the record indicates there was substantial evidence to support the finding and affirmance of the $90 penalty was not an abuse of discretion. This item will not be further discussed.

3. 29 C.F.R. § 1926.451(i)(8) provides:

> On suspension scaffolds designed for a working load of 500 pounds, no more than two men shall be permitted to work at one time. On suspension scaffolds with a working load of 750 pounds, no more than three men shall be permitted to work at one time. Each employee shall be protected by an approved safety life belt attached to a lifeline. The lifeline shall be securely attached to substantial members of the structure (not scaffold), or to securely rigged lines, which will safely suspend the employee in case of a fall. In order to keep the lifeline continuously attached, with a minimum of slack, to a fixed structure, the attachment point of the lifeline shall be appropriately changed as the work progresses.

4. 29 C.F.R. § 1926.451(i)(9) provides:

> Two-point suspension scaffolds shall be securely lashed to the building or structure to prevent them from swaying. Window cleaners' anchors shall not be used for this purpose.

5. 29 C.F.R. § 1926.451(i)(11) provides:

> Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), approximately 42 inches high, with a midrail, and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

The facts surrounding the alleged violations are largely uncontested. On July 11, 1974, Western employees were engaged in sandblasting and finishing operations on the exterior walls of a four-story brick building in Omaha, Nebraska. They were working from two-poin. suspension scaffolds suspended at various heights ranging from approximately 17 to 47 feet above the ground. The scaffolds were equipped with a guardrail on the platform edge facing away from the building, but had no toeboards or midrails on any of the sides and were not lashed to the walls of the building. No lifelines had been rigged, and some five employees were working from the scaffolds without safety belts.

Following an inspection by Occupational Safety and Health Administration (OSHA) compliance officers, Western was cited for willfully violating the safety belt and lifeline standard,[6] the lashing standard,[7] and a general scaffolding standard requiring scaffolds to have guardrails and toeboards.[8] The proposed penalty was $9000. Western timely filed its notice contesting the alleged violations contained in the citation and the proposed penalty as excessive.

The administrative law judge affirmed a willful violation of these three standards and the proposed penalty

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6. 29 C.F.R. § 1926.451(i)(8); *see* note 3 *supra*.

7. 29 C.F.R. § 1926.451(i)(9); *see* note 4 *supra*.

8. 29 C.F.R. § 1926.451(a)(4) provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the grounds or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

of $9000. Western timely filed its petition for discretionary review with the Review Commission and review was granted. The Review Commission, Commissioner Moran dissenting, held that Western had willfully violated the safety belt and lifeline standard and the lashing standard. The Review Commission refrained from ruling on whether Western had willfully violated the general scaffolding standard requiring guardrails and toeboards[9] and, instead, sua sponte amended the citation and held that Western had willfully violated the more specific standard requiring midrails in addition to guardrails and toeboards.[10] We have jurisdiction to hear Western's appeal under section 11(a) of the Act, 29 U.S.C. § 660(a), the alleged violations having occurred in Omaha, Nebraska.

The principal issues in this appeal are whether there was substantial evidence to support the finding of the Commission that Western willfully violated the lashing standard, toeboard standard, and the lifeline and safety belt standard and whether the Commission abused its discretion in imposing the $9000 penalty. 29 U.S.C. § 660(a); *see Brennan* v. *OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973).

Western argues that its failure to install toeboards or to lash the scaffold to the building was not a willful violation of the Act because it met the underlying purpose of the provision through other means.[11] In dealing with

9. 29 C.F.R. § 1926.451(a)(4); *see* note 8 *supra*.

10. 29 C.F.R. § 1926.451(i)(11); *see* note 5 *supra*.

11. Commissioner Moran, dissenting, agreed with the majority affirmance of the charges alleging lashing and guardrail violations. But it was his view that Western's failure to lash was based on its good faith belief that the suspension system was tight enough to prevent lateral movement and make the scaffold safe for employee use. He would affirm only a non-

(*Continued on following page*)

this argument we must define what constitutes a willful violation under the Act. Although a "willful violation" is not defined in the Act, the Review Commission and the Secretary of Labor have interpreted a willful violation to be "an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." *General Electric Co.*, [1977] 3 Empl. Safety & Health Guide (CCH) (1977-1978 Occup. Safety & Health Dec.) ¶ 21,853 (May 19, 1977); *Kent Nowlin Constr., Inc.*, [1977] 3 Empl. Safety & Health Guide (CCH) (1977-1978 Occup. Safety & Health Dec.) ¶ 21,550 (Feb. 15, 1977); *Williams Enterprises, Inc.*, [1976-1977] Occup. Safety & Health Dec. (CCH) ¶ 21,071 (Sept. 8, 1976). "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Usery* v. *Godfrey Brake & Supply Service, Inc.*, 545 F.2d 52, 55 (8th Cir. 1976).

The Review Commission's definition is in accord with that adopted by the Fourth, Tenth and First Circuits. In *Intercounty Constr. Co.* v. *OSHRC*, 522 F.2d 777, 779-80 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976), the court observed that "[n]o showing of malicious intent is necessary. * * * Regardless of any good-faith belief

Footnote continued—

serious violation. As to the guardrail violation, Commissioner Moran would not affirm it as willful because safety precautions, although inadequate, were provided by Western to protect against a possible falling hazard, citing *Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd en banc*, 519 F.2d 1215 (3d Cir. 1975), *aff'd on other grounds*, 97 S.Ct. 1261 (1977). He would affirm a serious violation because the record indicates that death or injury could result if an accident occurred. Furthermore, he would vacate the lifeline violation because the foreman was fully instructed with respect to requiring the employees to use the lifeline and safety belt equipment. It was his view that it was improper to impute the foreman's knowledge to Western.

that the work area remained safe the fact is that the company knowingly chose not to comply with the OSHA regulations and requirements. That decision was a willful action in violation of the law."

In *United States* v. *Dye Constr. Co.*, 510 F.2d 78, 81 (10th Cir. 1975), the court approved a jury instruction on willfulness which reads as follows:

> The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

In *F. X. Messina Const. Corp.* v. *OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974), the court, in affirming the Commission's finding of willfulness, observed: "Petitioner, through its foreman, made its choice, a conscious, intentional, deliberate, voluntary decision, which, regardless of a venial motive, properly is described as willful." *Cf. Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200 (3d Cir. 1974), *aff'd en banc*, 519 F.2d 1215 (3d Cir. 1975), *aff'd on other grounds*, 97 S.Ct. 1261 (1977). "Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply." *Id.* at 1207. We are in accord with the views expressed in the Fourth, Tenth and First Circuits set out above.

In applying this standard to the present case, we need not decide whether or not Western did in fact believe that their actions met the underlying purpose of the standards through other means. Western's management personnel were well aware of the scaffolding standards for which they were cited. Western's officials substituted their own judgment for the provisions of the standards and therefore cannot escape the conclusion that they acted voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act.[12] The regulations allow no such unbridled discretion.

For example, the Commission made the following observation with respect to the lashing citation:

> With respect to the lashing allegation, however, the standard is unequivocal, and Respondent argues only that it did not comply with the standard because it thought the scaffold was adequately prevented from swaying without lashing. Essentially, Respondent's position is that it may disregard the standard if it unilaterally determines that compliance is not necessary. We agree with the Judge that Respondent's position amounts to a deliberate choice to disregard the requirements of the standard. The violation of 1926.451(i)(9) was therefore willful. [Footnote omitted.]

We agree with the Commission. We note further that the record indicates that without lashing there was little protection if a storm or wind came up.

Western also contends it was an abuse of discretion for the Review Commission to sua sponte amend the citation to show a willful violation of the more specific standard at 29 C.F.R. § 1926.451(i)(11) requiring midrails

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12. The Act does provide for an application to the Secretary of Labor for a variance in a situation where an employer believes he can satisfy the purpose of the statute by other means. Section 6(d) of the Act, 29 U.S.C. § 655(d).

and toeboards instead of the originally cited standard at 29 C.F.R. § 1926.451(a)(4) which required only toeboards. The evidence clearly shows that Western made a conscious decision not to use toeboards and therefore was in willful violation of the originally cited standard requiring toeboards. However, the Commission's amendment of the citation to allege a violation of the standard requiring midrails is another matter.

During the hearing before the administrative law judge at the time the Secretary offered evidence concerning the absence of midrails on the scaffolding, counsel for the Secretary stated:

> As I say, I'm offering the evidence on midrails to just show the issue of willfulness generally. I am not attempting to show a violation of the standard [29 C.F.R. § 1926.451(i)(11)] since it wasn't alleged.

In view of the Secretary's statement that no attempt was being made to show a violation of the midrail standard, we agree that the Commission erred in amending the citation during the review proceedings. We have recognized that in a proper case both the citation and the proposed penalty may be amended at the hearing before the administrative law judge. Furthermore, the Review Commission may affirm, decrease or increase the penalties proposed by the Secretary. *Long Mfg. Co., N.C., Inc.* v. *OSHRC*, 554 F.2d 903, 907-08 (8th Cir. 1977).

Under the circumstances the Review Commission could consider the evidence concerning midrail violations on the general issue of willfulness. It is our view, however, that since Western was specifically advised that no attempt to show a violation was being made, it was error for the Commission to amend the charge from a 29 C.F.R.

§ 1926.451(a)(4) violation to a violation of 29 C.F.R. § 1926.451(i)(11).

Western next contends it should be excused from responsibility for the acts of its working foreman in failing to rig lifelines or require safety belts. An employer is excused from responsibility for acts of its supervisory employees only if it shows that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors. *Ocean Electric Corp.*, [1975-1976] Occup. Safety & Health Dec. (CCH) ¶ 20,167 (Nov. 21, 1975), *pet. for review filed*, No. 76-1060 (4th Cir. Jan. 16, 1976); *B-G Maintenance Management, Inc.*, [1976-1977] Occup. Safety & Health Dec. (CCH) ¶ 20,744 (June 1, 1976).

Western presented testimony that it is company policy to require the use of safety belts when employees are working on two-point suspension scaffolds, that the working foreman was aware of this company policy, that the working foreman had been instructed by the superintendent to rig lifelines, and that Western had no reason to believe that the working foreman would not enforce the rule requiring the use of safety belts.

However, the record discloses that the scaffolds were rigged and placed in use before noon on the day of the inspection. OSHA compliance officers arrived about 3:00 p.m. and noted that lifelines were not installed with respect to any of the four scaffolds in place and that none of the workmen were wearing safety belts. During the inspection the foreman told Mr. Beelman, compliance officer, that none of this equipment was present at the job site. (The administrative law judge so found.) Later in the

hearing the foreman testified that he had been instructed to be sure the lifelines were up and the safety belts utilized. He testified he didn't recall being asked if this equipment was on the job but that the equipment was on the job. He further stated: "I told them that I had—that I was busy rigging over and that I had to bore holes and stuff up there to put them down and I just didn't have the time. I was too busy and I just didn't do it." The scaffolds were suspended at various heights ranging from 17 to 47 feet above ground level. Five workmen were noted on the scaffolds without safety belts or lifelines to which to attach them.

The administrative law judge also took note that Western had previously been cited for failure to comply with scaffold standards with respect to guardrails, midrails and toeboards under 29 C.F.R. § 1926.451(i)(11) and under 29 C.F.R. § 1926.451(i)(8) for having an employee on the same type scaffold whose lifeline was not attached. These citations were issued following a fatal accident in which an employee fell from a scaffold on the eleventh floor to a fifth floor mezzanine after apparently suffering a seizure. *See Marshall* v. *Western Waterproofing Co., Inc.*, 560 F.2d 947 (8th Cir. 1977). The Review Commission held that it was error to admit the prior citation as a "history of repeated conduct in violation of the Act" because the prior citation was vacated by the administrative law judge because of failure to conform to section 8(e) of the Act, 29 U.S.C. § 657(e). (The instant hearing occurred prior to our holding in *Marshall*, 560 F.2d 947.)

Nevertheless, the prior citation and conferences in connection therewith were relevant to show Western's knowledge as to the requirements of the Act and Regulations and the exposure of its employees to serious injury or

death resulting from a failure to comply. Failure of an individual employee to hook up his safety belt might conceivably go unnoticed, but failure to rig the lifelines for three hours was inexcusable in this case. We have no difficulty in affirming this violation as willful on the part of Western.

In summary, we hold that there was substantial evidence to support the administrative law judge's finding that Western willfully violated the lashing standard and the safety belt and lifeline standard. Furthermore, the evidence fully supports the conclusion that Western willfully violated the toeboard standard contained in the original citation. We vacate the Commission's determination that Western is guilty of a willful violation of the midrail standard.

The matter of penalty is within the discretion of the Commission. Whether or not the $9000 penalty should be reduced and, if so, in what amount, is within the discretion of the Commission.

Affirmed in part and reversed in part. Remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

OSHRC DOCKET NO. 9225

SECRETARY OF LABOR,
Complainant

v.

WESTERN WATERPROOFING CO., INC.,
Respondent

DECISION

Before BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

BARNAKO, Chairman:

A decision of Administrative Law Judge Vernon Riehl is before us for review. Judge Riehl affirmed a citation alleging that Respondent willfully violated the Occupational Safety and Health Act of 1970[1] by failing to comply with the construction safety standards at 29 C.F.R. 1926.451 (a)(4), §1926.451(i)(8), and §1926.451(i)(9).[2] He assessed a penalty of $9,000 for the violation. Judge Riehl also affirmed a citation alleging that Respondent committed a nonserious violation by failing to comply with the construction safety standard at 29 C.F.R. §1926.150(a)(1).[3] He assessed a penalty of $90.

1. 29 U.S.C. 651 *et seq.*, hereinafter, "the Act."

2. 1926.451(a)(4): Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground. . . .

1926.451(i)(8): On suspension scafffolds. . . . Each employee shall be protected by an approved safety belt attached to a lifeline. . . .

1926.451(i)(9): Two-point suspension scaffolds shall be securely lashed to the building or structure to prevent them from swaying. . . .

Review was directed on the following issues: "(1) Was there sufficient evidence to show that respondent (a) committed a willful violation as alleged, (b) violated as alleged 29 U.S.C. §654(a) by failing to observe the requirements of 29 C.F.R. §1926.150(a)(1)? (2) Did the Judge properly admit evidence of an earlier allegation by complainant against this respondent which was contested and never proved?"

We affirm the Judge's decision to the extent that it is consistent with the following.

The Alleged Willful Violation

On July 11, 1974, Respondent's employees were performing sandblasting and finishing operations on the exterior walls of a four-story, brick building. They were working from two-point suspension scaffolds at various heights, ranging approximately from 17 to 47 feet above ground level.

One of the scaffolds was on the west side of the building's north wing. The platform edge facing the wall was not equipped with a guardrail, midrail, or toeboard. A gap of approximately 12 to 18 inches existed between the platform and the face of the wall. The opposite side

3. 1926.150(a)(1): The employer shall be responsible for the development of a fire protection program to be followed throughout all phases of the construction . . . work, and he shall provide for the firefighting equipment as specified in this subpart. As fire hazards occur, there shall be no delay in providing the necessary equipment.

of the platform was equipped with a guardrail but not with a midrail or a toeboard. The ends of the platform did not have guardrails, midrails, or toeboards, but they were guarded by the stirrups from which the scaffold was suspended. The scaffold was not lashed to the wall. An employee working on the scaffold was not using a safety belt, and a lifeline had not been rigged. The other scaffolds were similarly equipped and used, and employees on them were not using safety belts.

Respondent's management personnel were aware of the scaffolding standards involved in this case. They testified that in their opinion the scaffolds were equipped properly and secured adequately against swaying. They thought that guardrails were not needed on the side of the scaffold facing the wall because, in their judgment, this side is not "open" as that term is used in the standard. They also thought that the ends were not "open" as the term is used in the standard because of the presence of the suspension stirrups.[4] They also thought it was not necessary to lash the scaffolds to the walls because the rigging was tight enough to avoid excessive sway.

Respondent's branch manager testified that it is company policy to require the use of safety belts when employees are working on two-point suspension scaffolds. The policy allegedly includes a warning for a first violation, and suspension from work for subsequent violations. No employee had ever been discovered committing a second violation of the safety belt requirement.

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4. The Judge found to the contrary saying that one official admitted that the end of one scaffold was open. (Judge's decision at page 8.) We reject the finding. The witnesses admission was to the effect that if prior testimony was correct then the scaffold end was open. The witness qualified his statement by indicating his disbelief of the prior testimony.

Nevertheless, at the time in question, several of Respondent's employees were working on two-point suspension scaffolds and were not using safety belts. Respondent's foreman testified that he had intended to rig lifelines to which the employees could tie safety belts, but that he had not yet done so that day because he "was too busy" and he "just didn't get to it." He confirmed, however, that it was company policy to use safety belts, and that he had been instructed by the superintendent to rig lifelines. Respondent's superintendent testified that he had worked with the foreman for twenty years, and was certain that the foreman had always before enforced the rule requiring the use of safety belts. The superintendent also testified that, on one previous occasion on this same jobsite, he had reprimanded an employee for failing to have his safety belt tied off, and specifically instructed the foreman at that time to inform him if any employee again violated the rule.

Respondent had been cited previously for allegedly violating the scaffolding standards at 1926.451(i)(8) and (i)(11). The citations were issued on June 19, 1972, following an incident in which an employee fell from a two-point suspension scaffold. Judge Paul E. Dixon vacated those citations on grounds unrelated to the merits of the alleged violations, and Commission review of his decision was pending when Judge Riehl issued his decision in the instant case.[5]

Judge Riehl concluded that the violation was willful because he found that Respondent voluntarily and know-

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5. The Commission subsequently vacated the citations on the basis that the inspection which led to the issuance of the citations failed to conform to Section 8(e) of the Act. *Western Waterproofing Co., Inc.*, 76 OSAHRC 64/A2, BNA 4 OSHC 1301, CCH OSHD para. 20,805 (June 21, 1976), pet. for review filed, No. 76-1703 (8th Cir., Aug. 18, 1976).

ingly violated the standards. In this regard, the Judge concluded from the record that Respondent has "in fact conducted itself in almost child like stubborn resistance to conforming to standards." (Judge's decision at page 19.)

Specifically, he found that Respondent's branch manager had knowledge of the guardrail requirements but deliberately chose to rely on his own interpretation of those requirements. The Judge interpreted the cited standard as requiring guardrails on the wall-facing sides of the scaffolds and on their ends. He also found that the scaffolds were not provided with midrails and toeboards on their back sides, i.e., the sides away from the building.

Regarding the lashing allegations, the Judge noted that Respondent's supervisory personnel had actual knowledge of the standard's requirements, but that they consciously decided that lashing was unnecessary in the circumstances of this case. He concluded that Respondent was simply substituting its own judgment for the requirement of the standard, and found this constituted a willful violation of the standard.

As to the safety belt allegations, Judge Riehl noted that Respondent's foreman had consciously decided that work should proceed without the use of safety belts and lifelines. He imputed the foreman's knowledge and conduct to Respondent, and therefore found that Respondent intentionally, and therefore willfully, violated the standard.

Respondent contends that the Judge erred in finding it in willful violation for the following reasons: 1) as to the guardrail and lashing violations, Respondent held a good faith opinion that its conduct conformed to the standards, and a finding of willfulness cannot be based on a good faith difference of opinion between Complainant and an employer concerning the requirements of a standard or standards; 2) concerning the safety belt violation, the conduct of its foreman was in violation of company policy and should therefore not be imputed to Respondent; and 3) the Judge erred by admitting into evidence and considering the circumstances surrounding the prior citation, as the contest of that citation was still pending. Respondent argues that the Judge's reference to a "history of repeated conduct" shows that he was influenced by the prior citation.[6]

We affirm the Judge's finding that the safety belt and lashing aspects of the violation were willful. It is undisputed that Respondent had actual knowledge that the use of safety belts tied off to lifelines was required by 1926.451(i)(8), and that Respondent's foreman had consciously decided to allow work to proceed without requiring their use. Respondent's argument that the foreman's action should not be imputed to it is without merit. An employer is only excused from responsibility for the acts of its supervisors if it shows that such acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors. *Ocean Electric Corp.*, 75 OSAHRC 6/C14, BNA 3 OSHC 1705, CCH OSHD para. 20,167 (1975), pet. for review filed, No. 76-1060 (4th Cir., Jan. 16, 1976); *B-G Maintenance Management, Inc.*, 76

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6. Respondent also contends that it was error for the Judge to admit evidence concerning an inspection of another of its worksites about two months after the inspection which led to the citations in this case. Review was not specifically directed on this issue. We do not need to and have not used this evidence to arrive at our determination, although we do note that such evidence can be relevant on the issue of whether an employer has engaged in a course of conduct in disregard of the law. See Rule 404(b), Federal Rules of Evidence.

OSAHRC 60/A2, BNA 4 OSHC 1282, CCH OSHD para. 20,744 (June 1, 1976). The defense is not established by the unsupported assertion that the foreman who committed the violation had never before been known to violate company safety policy.[7] As the foreman consciously decided to allow work to proceed in violation of 1926.451(i)(8), the violation was willful, even under the test announced in *Frank Irey, Jr., Inc.*, 519 F.2d 1200 (3rd Cir. 1975).

With respect to the lashing allegation, however, the standard is unequivocal, and Respondent argues only that it did not comply with the standard because it thought the scaffold was adequately prevented from swaying without lashing.[8] Essentially, Respondent's position is that it may disregard the standard if it unilaterally determines that compliance is not necessary. We agree with the Judge that Respondent's position amounts to a deliberate choice to disregard the requirements of the standard. The violation of 1926.451(i)(9) was therefore willful.

Concerning the guardrail allegation, however, we note that in our earlier decision involving this Respondent the two Commissioners who expressed an opinion on whether the side of the scaffold adjacent to the building wall is "open" reached different conclusions. *Western Waterproofing Co., Inc.*, supra note 5 (Barnako, Chairman (lead

7. The fact that the employees on the scaffolds began their work without safety belts and lifelines also casts serious doubt on the vigor with which the company policy requiring the use of safety belts was enforced.

8. Respondent relies on *C. N. Flagg & Co., Inc.*, 15 OSAHRC 379, BNA 2 OSHC 1539, CCH OSHD para. 19,251 (1975) for the proposition that a violation is not willful when an employer in good faith interprets a standard differently than the Secretary. Its reliance is misplaced. In that case the difference of opinion related to the requirements of the trenching standards and to the question of whether one or another such standard applied to the facts. Here there is no room for a difference of opinion.

opinion) and Cleary, Commissioner (concurring in part and dissenting in part)). As for the ends of the scaffold the Commissioners agreed that stirrups could substitute for guardrails but disagreed on the question of whether toeboards were necessary. Accordingly, we cannot say that Respondent's view is unreasonable to the point of showing bad faith. Inasmuch as we have found that the citation should be affirmed as willful in other respects we believe it is unnecessary to make a specific finding of willfulness as to the guardrails. A violation has been established since the scaffolds were not equipped with midrails and toeboards.[9]

In concluding that the violation was willful, we have considered the undisputed fact that Respondent, through its supervisory employees, had actual knowledge that paragraphs 451(i)(8) and (i)(9) were being violated. Evidence of the prior citation was relevant to show that Respondent had knowledge of the guardrail requirements and was properly admitted for this purpose. 5 U.S.C. 556(d). We note, however, that the evidence was only cumulative on the notice issue, since other evidence established that Respondent had actual knowledge of the standards involved herein.

Thus, it was not error on the part of the Judge to admit evidence of the prior citation. In view of the fact,

9. We note, however, that the guardrail charge should have been brought under 1926.451(i)(11), which establishes guardrail requirements for two-point suspension scaffolds, rather than 1926.451(a)(4), which is the general standard. Indeed, the Judge found that 1926.451(i)(11) was the standard violated, although he did not explicitly amend the citation to allege a violation of that standard. Inasmuch as the requirements of the two standards are substantially the same, Respondent is not prejudiced by an amendment of the citation to allege the proper standard, and we therefore amend the citation. *Melody Home & Insulation Co.*, No. 6908, BNA 4 OSHC 1852, 1854 n.4, CCH OSHD para. 21,290 (Nov. 16, 1976).

however, that the prior citation was ultimately vacated, it was error for the Judge to use it as a "history of repeated conduct in violation of the Act." That does not, however, alter the validity of the Judge's ultimate conclusion that Respondent acted in conscious disregard of the standards, and therefore committed a willful violation.

In making his penalty assessment, the Judge relied heavily on his finding that Respondent had acted in bad faith. As noted above, he also alluded to a history of conduct in violation of the Act. Because of the fact that the prior citations were vacated, Respondent in fact has no prior history of violations. Nevertheless, we accept the Judge's basic finding that Respondent acted in bad faith. That finding was based largely on the Judge's evaluation of the testimony of Respondent's management personnel. The Judge had an opportunity to observe their demeanor and draw the proper inferences from their testimony. His finding is supported by the preponderant evidence, and we therefore accept it. *Okland Construction Co.*, 76 OSAHRC 30/F4, BNA 3 OSHC 2023, CCH OSHD para. 20,441 (Feb. 20, 1976). Moreover, we note that the gravity of the violation was high. A fall from any one of the scaffolds would almost certainly have resulted in death or serious harm, and no means were employed to prevent employees from falling other than the backrails. Considering that the violation was of high gravity, that Respondent acted in bad faith, and that Respondent is of moderate size, with over 100 employees, we conclude that a penalty of $9000 is appropriate.

Alleged Violation of 1926.150(a)(1)

The compliance officer who inspected Respondent's worksite questioned Respondent's foreman concerning

available fire protection measures, and testified that the foreman told him "he did not have anything." Respondent's superintendent testified that there were fire extinguishers, to which Respondent's employees had access, inside every entrance of the building. He also said that water hoses hooked up to the sandblasting equipment could be used to fight fires. The superintendent was "sure" that the foreman knew that fire extinguishers were available. Although the foreman was called by Respondent to testify, he was not asked whether he knew of the presence of fire extinguishers, or whether he made the statement to which the compliance officer testified.

Based on the compliance officer's testimony, the Judge found that Respondent did not have a fire protection program, and therefore affirmed the citation. On review, Respondent cites the superintendent's testimony to show that the fire protection on the jobsite was adequate, and that the foreman knew of the presence of the extinguishers. The record, however, supports the Judge's finding that the foreman was unaware of any fire protection measures available on the jobsite. Even if adequate fire protection was present, the fact that the foreman was unaware of it shows that Respondent did not have a fire protection program, and thus violated the cited standard. We therefore affirm the Judge's disposition of this violation. We also conclude that the Judge's $90 penalty assessment is appropriate.

Accordingly, the citation for willful violation is amended to substitute 29 C.F.R. §1926.451(i)(11) in place of 29 C.F.R. §1926.451(a)(4) and as so amended is affirmed. A penalty of $9,000 is assessed for the violation. The citation alleging nonserious violation for failure to

comply with 29 C.F.R. §1926.150(a)(1) is affirmed, and a penalty of $90 is assessed therefor.

So ORDERED.

For the Commission:

/s/ William S. McLaughlin
William S. McLaughlin
Executive Secretary

By: /s/ Gloria W. White
Gloria W. White
Acting Executive Secretary

Date: February 24, 1977

MORAN, Commissioner, Concurring in Part, Dissenting in Part:

My colleagues err in affirming the citations for noncompliance with 29 C.F.R. § 1926.451(i)(8) and 1926.150(a)(1) and in classifying the remaining violations as willful. I therefore dissent from those holdings.

The charge alleging a willful violation of the Act for noncompliance with the standard set forth at 29 C.F.R. § 1926.451(i)(8) should be vacated because of the foreman's admitted failure to follow established and known company policy. The evidence indicates that respondent provided its employees with safety belts and lifelines. In fact, new lifelines had been purchased by respondent for employee use at the worksite in question. The foreman had been specifically instructed by his immediate supervisor to have his men use this equipment. The foreman, however, disregarded these instructions and permitted his men to commence work before he had the lines hooked up. Respondent was unaware of any prior violations of safety rules by the foreman.

Under these facts, it is improper to impute the foreman's knowledge to respondent in order to find liability under the Act. What this amounts to is the imposition upon respondent of a standard of strict liability which is neither authorized nor intended by the Act. *Horne Plumbing and Heating Co.* v. *OSAHRC*, 528 F.2d 564 (5th Cir. 1976); *Secretary* v. *B. D. Click Co.*, OSAHRC Docket No. 9806, October 29, 1976; *Secretary* v. *Engineers Construction Incorporated*, 20 OSAHRC 348 (1975).

Although I agree with the affirmance of the charges alleging lashing and guardrail[10] violations of the scaffolding standards, I do not find that these violations should be characterized as willful in nature, thereby subjecting respondent to the higher penalty sanctions of 29 U.S.C. § 666(a). Respondent's failure to lash the two-point suspension scaffold was violative of the cited standard, 29 C.F.R. § 1926.451(i)(9), but in good faith it believed that the suspension system was tight enough to prevent lateral movement and make the scaffold safe for employee use. Under these circumstances, it is obviously wrong to classify the violation was willful. *See Frank Irey Jr., Inc.* v. *OSAHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974). Only a nonserious violation should be affirmed.[11]

The guardrail violation, 29 C.F.R. § 1926.451(a)(4), should be affirmed as serious. The willful allegation cannot be sustained because safety precautions, although inadequate, were provided by respondent to protect against

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10. I would not permit the charge to be amended from a 29 C.F.R. § 1926.451(a)(4) violation to a violation of 29 C.F.R. § 1926.451(i)(11). *Secretary* v. *Warnel Corporation*, OSAHRC Docket No. 4537, March 31, 1976 (dissenting opinion). I find, however, that since the originally cited standard contains the same guardrail requirements, a violation of that standard has been established.

11. Complainant's inspector observed no more than a 2 to 3 inch lateral sway.

a possible falling hazard. *See Frank Irey Jr., Inc.* v. *OSAHRC, supra*; *Secretary* v. *Williams Enterprises, Inc.*, OSAHRC Docket No. 4533, September 8, 1976. A serious violation should be affirmed, however, because the seriousness of the violation was tried by the implied consent of the parties and the record indicates that death or serious injury could result if an accident occurred. *Secretary* v. *Toler Excavating Company*, OSAHRC Docket No. 2637, July 29, 1975.

Finally, vacation of the citation for noncompliance with the safety standard codified at 29 C.F.R. § 1926.150 (a) (1) is required because of insufficient evidence. The majority affirms this charge because of supposed statements made by the foreman to the inspector indicating that the foreman was unaware of the presence of any fire protection equipment at the worksite. The inspector's testimony does not, however, justify this conclusion. The relevant testimony by the inspector, appearing at page 91 of the transcript, is as follows:

> "Q. Did you ask Mr. Helverson [the foreman] specifically what fire protection measures he had available?
>
> A. Yes.
>
> Q. Can you recall what his response was?
>
> A. He did not have anything.
>
> Q. In other words, did you ask him specifically about extinguishers?
>
> A. Yes, I did.
>
> Q. Water supplies?
>
> A. (Nods affirmatively.) *I asked him about extinguishers.*" (Emphasis added.)

Although this makes it clear that the foreman was not aware of *fire extinguishers* at the site, it does not establish that he was not aware of the presence of the water hoses which were attached to the sandblasting equipment and which could reach any location at the jobsite where respondent's employees were working. Since water hoses constitute alternative firefighting equipment which can be substituted for extinguishers under 29 C.F.R. § 1926.150 (c) (iii) and respondent's superintendent testified that such hoses were available at the worksite, the evidence is insufficient to establish the alleged violation.

In view of my colleagues' reliance, in part, on Judge Riehl's decision, his decision is attached hereto as Appendix A.

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

OSAHRC DOCKET 9225

JOHN T. DUNLOP, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Complainant

v.

WESTERN WATERPROOFING CO., INC.,
Respondent

APPEARANCES:

DONALD McCOY, Esquire, U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri, for the Complainant

THOMAS M. MOORE, Esquire, Miller and O'Laughlin, P.C.,
Kansas City, Missouri, for the Respondent

Hearing held February 25, 1975, Omaha, Nebraska,
Judge Vernon Riehl presiding

STATEMENT OF CASE

Vernon Riehl, Judge, OSAHRC

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970, (29 U.S.C. 651 *et seq.*, hereinafter called the Act) contesting citations issued by the complainant against the respondent under

the authority vested in the complainant by section 9(a) of the Act. The citations allege that an inspection of a workplace under the operation and control of the respondent revealed the existence of workplace conditions that violate section 5(a)(2) of the Act for the reason that these conditions fail to comply with certain occupational safety and health standards promulgated by the Secretary of Labor pursuant to section 6 thereof.

A description of the alleged violations contained in said citations states:

CITATION FOR NONSERIOUS VIOLATION

Item 1

29 CFR 1926.150(a)(1)

(2410 South 10th Street, Omaha, Nebraska) No firefighting equipment was provided at the job site. A fire protection program to be followed throughout all phases of construction and demolition work was not provided.

Item 2

29 CFR 1926.251(c)(5)(1)

(In Attic Near West Edge of Main Section of the Building Located at 2410 South 10th Street, Omaha, Nebraska) An employee was working from a 2-point suspension scaffolding. The blocks and tackles used with this scaffold were attached to wire ropes which had cable clamp (U-bolt) connections. One cable clamp connection was improperly made because one clamp was placed with the U part against the line side of the wire rope (This reduces the efficiency of the cable clamp fastening). All cable clamps shall be so placed that the U part is on the "Dead End" of the rope.

CITATION FOR WILLFUL VIOLATION

Item 1

29 CFR 1926.451 (i) (8)

(a)

(At Eve Of Roof Above Fourth Story On West Side Of Main Section Of Building, Level With Third Floor Window Sill On South Side Of North Wing, Level With Top Of First Floor Window On West Side of North Wing, And Level With Second Floor Window Sill On North Side Of North Wing Of Building) Employees working on 2-point suspension scaffolds were not protected by an approved safety belt attached to a life line.

29 CFR 1926.451 (i) (9)

(b)

(At Eve Of Roof Above Fourth Story On West Side Of Main Section Of Building, Level With Third Floor Window Sill On South Side of North Wing, Level With Top Of First Floor Window On West Side Of North Wing, And Level With Second Floor Window Sill On North Side Of North Wing Of Building) Employees were working on 2-point suspension (swinging) scaffolds which were not securely lashed to the building or structure to prevent them from swaying.

29 CFR 1926.451 (a) (4)

(c)

(At Eve Of Roof Above Fourth Story On West Side of Main Section Of Building, Level With Third Floor Window Sill On South Side

of North Wing, Level With Top Of First Floor Window On West Side of North Wing, And Level With Second Floor Window Sill On North Side Of North Wing Of Building) Employees were working on scaffolding which was not equipped with guardrails and toeboards, and said scaffolding was more than 10′ above ground.

In his brief, the Solicitor for the Department of Labor has advised us that the evidence of record regarding the alleged violation of 29 CFR 1926.251 (c) (5) (i), item 2 of the citation for nonserious violation, does not appear to adequately support the alleged violation. Therefore, the Secretary moved to dismiss item 2. We have considered the matter and item 2, and the proposed penalty will be vacated.

Respondent has admitted that it is an employer engaged in a business affecting commerce as defined by section 3 (5) of the Act (answer, paragraph II).

ISSUES

1. Whether respondent violated the provisions of the occupational safety and health standards in the manner alleged in the citation for nonserious violation, item 1, and in the citation for willful violation.

2. Whether respondent's alleged violation of 29 CFR 1926.451 (i) (8), 29 CFR 1926.451 (i) (9) and 29 CFR 1926.451 (a) (4) was willful violation within the meaning of section 17 (a) of the Act.

3. Whether the proposed penalties of $90 for item 1 and $9000 for the alleged willful violation are appropriate under section 17 (j) of the Act.

STATEMENT OF FACTS

The compliance officer, on July 11, 1974, inspected a construction worksite of respondent which was located at 1515 S. 10th Street, Omaha, Nebraska (T. 21).

The compliance officer observed employees of respondent working from two-point suspension scaffolds. They were performing sandblasting and finishing operations on the exterior of a building known as the Grace Bible Institute (T. 22).

When the compliance officers appeared at the worksite, approximately 3:00 p.m., they were directed to the foreman in charge of the jobsite, Mr. Robert Halverson. They presented their credentials to Mr. Halverson and informed him of the purpose of their visit (T. 22-23). Thereupon, Mr. Halverson telephoned his superiors and indicated that he had been instructed to act as a representative of the company for purposes of the inspection. He then accompanied the compliance officers on the inspection of the jobsite (T. 23-24).

During the course of their inspection, the Compliance Officers observed a two-point suspension scaffold suspended directly above the main entrance door of the Grace Bible Institute on the west exterior portion of the building (T. 24, exhibit G-5). This scaffold was equipped with a top guardrail on its back side, i.e., the side of the scaffold which was furthest away from the face of the building. There was no midrail between the top guardrail and the surface of the platform, neither guardrails nor midrails on the ends and the side of the scaffold, which was adjacent to the face of the building, nor any toeboards in evidence anywhere upon the scaffold (T. 24, exhibit G-5).

The scaffold was suspended approximately four floors up from the ground at an approximate height of 47 feet from ground level (T. 26, 93-94).

The compliance officer observed one employee performing sandblasting operations from the scaffold over the entrance. The employee, pictured in exhibit G-5, was then observed by the compliance officer leaving the end of the scaffold, climbing onto the roof and entering the building through the open window shown in the left-hand portion of exhibit G-5 (T. 27-28).

The scaffold shown on exhibit G-5 was resting on the eaves of the building leaving a distance of approximately 12 to 16 inches between the leading edge of the scaffold and the building face (T. 28-29). In the compliance officer's opinion: "There was a very good possibility that an employee could fall in that space between the front edge of the scaffold and the exterior portion of the building." (T. 29)

The compliance officers observed a second two-point suspension scaffold positioned on the west side of the north wing of the building at the top of the second story at an approximate height of 17 feet above ground level (T. 30-32, 95; exhibit G-6). This scaffold was similarly equipped with only a top rail on the back side, no midrail, no guard rails on either end, nor on the side facing the building, nor any toeboards (T. 32, exhibit G-6). The 2 X 4 "kicker" or extension arm held the right end of the scaffold approximately 12 to 18 inches away from the recessed wall of the building, a distance which was ample for an employee to fall through (T. 33, exhibit G-6).

An employee shown working from the scaffold in exhibit G-6 was not equipped with a safety belt and lifeline (T. 33). Neither was another employee, who was later observed by the compliance officer, Mr. Beelman, on a similarly inadequately guarded platform shown in the upper right hand portion of exhibit G-6 (T. 32).

The compliance officers observed another two-point suspension scaffold, on the north side of the north wing, similarly equipped with only a toprail along the back supporting two employees, neither of whom were protected by safety belts and lifelines (T. 34, exhibit G-7). This scaffold was suspended approximately 23 feet above the ground (T. 34, 95). This scaffold had no toeboards and held buckets and containers which could fall and thus endanger employees who were observed working on the ground in the immediate vicinity (T. 35).

None of the scaffolds herein above described were lashed or secured to the building in anyway (T. 35).

Respondent's employees who were operating sandblasting equipment from the scaffold were wearing sandblasting hoods (similar to welding helmets but completely covering the employee's head). These hoods restricted their peripheral vision and required them to bend completely over in order to look down (T. 37-38). Additionally, the employee's vision was impaired by clouds of sand from the sandblasting operation itself (T. 39).

At the conclusion of the aforesaid, July 11th, inspection, the compliance officer, Mr. Beelman, explained to Mr. Halverson that all the scaffolds in use at the project appeared to be in violation of the requirements for guardrails, intermediate rails and toeboards, the requirement that they be properly lashed to the building, and that employees working from them should, according to the Occupational Safety and Health Administration standards, be provided with safety belts and attached lifelines (T. 42). The next day, the compliance officer returned to the jobsite and found that the employees had been equipped with safety belts and lifelines but that the scaffolds were in use in the same manner without any additional guardrails installed (T. 50).

On July 17, 1974, the citations herein were issued to Mr. Harvey Meehan, respondent's branch manager in Omaha, Nebraska, detailing the violations which were previously explained to Mr. Halverson. Thereafter, on September 24th, respondent was again observed using two-point suspension scaffolds with unguarded ends, and, failing to lash them to the building (T. 43-47, exhibits G-8, G-9).

The preponderance of the credible probative evidence establishes that the respondent and his officials were very well aware of the scaffolding standards long before the July 11th inspection, inasmuch as respondent's Omaha branch had previously been cited on June 19th, 1972, under 29 CFR 1926.451(i)(11) for failure to provide a similar two-point suspension scaffold with guardrails, midrails and toeboards at all open sides and ends, and, under 29 CFR 1926.451(i)(8) for having an employee on the same scaffold whose lifeline was not attached. The scaffold involved in these prior citations (pictured in exhibits G-10 through G-14) entirely lacked guardrails at its ends, which were open, and along side adjacent to the building face, which was held some distance away from the building by vertical pillars. The citations were issued following a fatal accident in which an employee of respondent fell through the open space between the scaffold and the building (see appendix B to exhibit G-3 and Mr. Meehan's testimony in OSAHRC Docket 1087 (exhibit G-16)). OSAHRC Docket 1087 was previously handled by Judge Paul E. Dixon who vacated the citations on procedural grounds and never went into the merits of the allegations in the citation. Review of this decision, by Judge Dixon, was directed by the Commission on May 15, 1974, and is still pending.

The preponderance of the credible evidence of record establishes that respondent's Omaha manager in fact had personal knowledge of the provisions of 29 CFR 1926.451 including the requirement that two-point suspension scaffolding be securely lashed to the building. He had this information well in advance of the issuance of the June 19, 1972, citations (see Mr. Meehan's testimony in docket 1087, pages 12, 132-133 (exhibit G-16)). Nevertheless, respondent's manager testified that as of June 11, 1974, guardrails were intentionally omitted from the front and ends of the scaffolds, herein in question, (T. 193) and that this omission was consistent with the company's safety policy (T. 194). Respondent's manager testified that the space between the face of the building and the scaffold shown in exhibit G-6 was sufficient for an employee to fall through (T. 196). Also, there was room for an employee to fall through in a similar space shown in exhibit G-5, (T. 199) a space through which his employee previously fell to his death (T. 199, exhibit G-11). Mr. Meehan persisted in stating that he considered these sides were not "open"; accordingly, he would not guard them with railings or otherwise (T. 196-200). He did admit however that the end of the scaffold above the main entrance, (exhibit G-5) from which Mr. Beelman observed an employee climb on the roof, was "open" (T. 195).

ITEM 1 OF THE CITATION FOR NONSERIOUS VIOLATION

At the time of the inspection, respondent's representative (Mr. Halverson) admitted that: "He did not have anything." when asked specifically if the fire extinguishers were present (T. 90-91).

The total evidence indicates that they were not in compliance with the standard.

It is respondent's contention that despite Mr. Halverson's statement that he had no fire protection devices available at the jobsite, that there were fire extinguishers within the building and that water hoses were used in connection with the sandblasting operation.

29 CFR 1926.150 states as follows:

> (c) Portable firefighting equipment—
> (1) Fire extinguishers and small hose lines. (i) A fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or major fraction thereof. Travel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet.

Taking Mr. Halverson's statement at face value that, "He did not have anything.", we find that respondent has not met his responsibility for the development of a fire protection program to be followed throughout all phases of construction or demolition work in question. The presence of inflammable fuel at the jobsite exposed employees to avoid the hazard. We note that the measures which respondent asserts were present to deal with the hazard would be stop-gap measures at best and these were unknown to the job foreman. We are accordingly affirming the violation of item 1 because the evidence compels us to do so. There is no dispute whatsoever that the employees observed during the compliance officer's inspection, working from a two-point suspension scaffold at various altitudes, were not protected by a "safety belt attached to a lifeline" as required by 29 CFR 1926.451 (i) (8). Neither was there any evidence contrary to the compliance officer's observation that none of the scaffolds were in anyway "lashed to the building or structure to prevent them from swaying." This is a clear violation of 29 CFR 1926.451 (i) (9).

There is no dispute either as to the alleged violations of 29 CFR 1926.451(a)(4) as to how the scaffolds were equipped. None of the scaffolds had toeboards or midrails on any side or end: each scaffold was equipped with a single top guardrail along its back side.

OPEN ENDS

A question to be resolved is what is meant in the standard by the words "open sides and ends".

It is the respondent's argument that the ends of the scaffolds in question were not "open" within the meaning of the standard because the supporting stirrups and ropes were located there. We do not subscribe to this argument because by definition *all* two-point suspension scaffolds have platforms "supported by hangers" (stirrups) at two points (29 CFR 1926.452(b)(34).

29 CFR 1926.451(i)(11) specifically requires that such scaffolds have guardrails, midrails and toeboards *"at all open sides and ends"*. Respondent's superintendent at the Grace Bible worksite stated that he didn't require a guardrail except on the back side of the scaffolds because the stirrups close the ends of each deck with the employees' work limited between the stirrups with the front sides being closed by the building wall.

There is a hazard as shown in exhibit R-2. The picture depicts at least one of the stirrups in question. It is entirely conceivable that one of the employees while wearing his face mask, and handling the sandblasting material could walk over ropes and other material on the scaffold and trip or stumble over the equipment, or get off balance and fall towards the end. During the testimony in our mind's eye, we could visualize such an employee, while tripping or getting off balance, reaching through the open

space left through the sides of the stirrups, and clutching wildly for the end guardrail (which should have been there, 42 inches above the platform). Then, tripping and tumbling over the stirrup to the side and falling five or six floors and splotching his head and body on the cold concrete below.

The same peril exists when the space inside the scaffolding, between the scaffold and building, is wide enough so that an employee's body could slip through and fall. The respondent has had one such experience previously in its history. He has been advised of the need and necessity for complying with the standard and has *willed* to continue in his operation, leaving off necessary guardrails, midrails, toeboards and end rails.

The scaffolds involved in the citation which face the building were "open" because the wall of the building did not protect workers from falling through the space between the scaffold and the wall. Where the condition exists, there is no protection for the workers from an open end (exhibit G-5, G-6).

Respondent contends that the scaffolds that they were using (which left a space from 12 to 16 or 18 inches between the scaffolds and the building had closed ends because they faced the building.

The American College Dictionary defines the word "closed":

1. to stop or obstruct (a gap, entrance, aperture, etc.).
2. to stop or obstruct the entrances, apertures, or gaps in.
3. to shut in or surround on all sides; enclose; cover in.

8. to become closed; shut.
16. shut; shut tight; not open.
17. shut in; enclosed.
18. completely enclosing.
19. without openings; with all openings covered or closed.
20. confined; . . . .
49. an enclosure about or beside a building, cathedral, etc.

—Syn. 1. Close, shut means to cause something not to be open. Closed suggests blocking an opening or vacant place; to close a breach in a wall. The informal word *SHUT refers esp. to blocking or barring openings intended for literal or figurative ingress and egress: to shut a door, mouth, gate, etc.* (emphasis added)

The definition of "*open*" states, among other things:

1. not shut, as door, a gate, etc.
2. not closed, covered, or shut up, as a house, box, drawer, etc.
3. *not enclosed as by barriers, as a space.*
4. *that may be entered,* used, shared, competed for, etc., ...
14. not covered or protected; exposed or bare: . . . .
15. unobstructed, as a passage, ...
21. having openings or apertures: . . . .
50. to become open, as a door, building, box, enclosure, etc.
67. an open or clear space. (emphasis added)

The definition of "*opening*" states:

1. a making or becoming open.
2. act of one who or that which opens (in any sense).
3. an unobstructed or unoccupied space or place.
4. an open space in solid matter; a gap, hole, or aperture. (emphasis added)

What we are concerned with in this case is the definition of the word "opening" in connection with employees working on a scaffold.

The thing that is of the most concern in the writing of standards is the creation of a standard that by law mandates the use of a scaffold as free from hazards as is humanly possible.

Of course the most dangerous hazard to employees, while working on a scaffold, is anything which can cause them to fall from the scaffold and become maimed or killed.

How does an employee fall from a scaffold? He falls from a scaffold when there is an opening of some kind big enough to permit him to slip to the ground far below when he trips, stumbles, falls or gets off balance.

In defining a scaffold, we know that there are two sides. That one side faces the wall, one side faces the outside open space. The scaffold also has two ends.

It would be the height of careless standard writing to provide safety for the employee at the side away from the building and two ends, and, not provide safety for him from falling through open spaces on the portion which faces the building, especially when there is space big enough for his body to fall following an instance wherein he stumbles, trips, falls or gets off balance for one reason or another.

We don't think the standard writers meant that there could be an open side against the building. We feel that the standard writers meant exactly what they said when they said:

> 1926.451(a)(4)
>
> Guardrails and toeboards shall be installed on *all open sides and ends* of platforms more than 10 feet above the ground or floor, ... Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on *all open sides and ends* of platform. (emphasis added)
>
> 1926.451(a)(5)
>
> Guardrails shall be 2 x 4 inches, or the equivalent, approximately 42 inches high, with a midrail, when required. Supports shall be at intervals not to exceed 8 feet. Toeboards shall be a minimum of 4 inches in height.

29 CFR 1926.451 is simply a standard adopted because of previous painful experiences involving employees who fell from scaffolds and became badly maimed, injured or killed. This standard is a requirement imposed by the Occupational Safety and Health Administration that respondent must comply with if the employee is to be guarded so far as humanly possible from injury while working on a scaffold. The standard, in other words, is based on previous *experience*. *Experience* has taught us that many others have fallen from scaffolds and been maimed and killed. *Experience* has taught us that unless we have proper safeguards such as end rails, midrails and toeboards on open sides that there will be more injuries and deaths, and, that is the reason for the standard. (see *Secretary* v. *Cornland Dressed Beef Company*, 8

OSAHRC 792 (1974)). Respondent has violated this standard and the total credible evidence establishes that he did it *willfully*.

In the case of Secretary v. Dallas Hotel Company, 18 OSAHRC ..... (Docket No. 5315) (1975) the Judge held that the platforms were not provided with guardrails and toeboards as required by regulation. It was further held:

> . . . the scaffold enclosing the platforms had guardrails at the ends and crossed braces on the side of the scaffold at the back of the employee and away from the building.
>
> * * *
>
> . . . there is more than enough space for a man to fall between the rear edge of the platform and the scaffold.
>
> * * *
>
> . . . the requirements would still not have been met by reason of the gap between the platform and the scaffold.

In that case, the court stated that any gap which is caused by failure to follow the standard is a violation of the standard (there were cross braces on the side of the scaffold at the back away from the building).

It does not matter where there is a gap caused by failure to properly install guardrails, midrails and toeboards. Such failure is always a violation of the standard if there is sufficient space for an employee to fall whether it be at the front or back of the scaffold or at the ends. The possibility of a fall is caused by failure to have guardrails, toeboards and midrails so affixed that there are no open spaces for an employee to fall through and become injured or killed.

To summarize: By dictionary and common sense definition, the respondent left openings on the scaffold of 12 to 16 inches on those sides of the scaffolds against the building. The ends of respondent's scaffolds were open because the employees could trip, stumble or get off balance and tumble through the openings left around the stirrups on the ends.

The failure to provide standard guardrails, midrails and toeboards on all sides and open ends is a violation of the standard. The failure to comply with the standard created a situation where respondent's employees were willfully subjected to known hazards. These hazards subjected respondent's employees to possible serious injury or death.

The following instruction was given in the criminal case of *U.S.* v. *Dye Construction Company, a Corp.*, U.S. Court of Appeals, Tenth Circuit, January 31, 1975, on the issue of defendant's willfulness:

> The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. *An omission or failure to act is willfully done if done voluntarily and intentionally.* (emphasis added)

The foregoing instruction was approved and the conviction affirmed by the United States Court of Appeals for the Tenth Circuit. The Court of Appeals went on to say that in *criminal* prosecution under the Occupational Safety and Health Act neither the statute nor the regulation requires that there be moral turpitude. The object of these provisions is prevention of injury or death and

its application is not limited to the situation in which the employer entertained a specific intent to harm the employee.

Therefore, the definition of "willfulness" in several enforcement cases is and should be no more stringent than a criminal prosecution, see *F. X. Messina Construction Corp.*, v. *OSAHRC*, 505 F.2d 701 (1974), in which the court affirmed the Commission's finding of a willful violation, stating that:

> Petitioner, through its foreman, made its choice, a conscious, intentional, deliberate, voluntary decision, which, regardless of a venial motive, properly is described as willful.

In the case of *Secretary* v. *C. N. Flagg and Company, Inc.*, 15 OSAHRC 379 (1975) the Review Commission characterized a willful violation as simply requiring "voluntary conduct as distinguished from accidental conduct." The Commission in that case stated that "an employer is entitled to have a good faith opinion that his conduct conforms to regulatory requirements in a given factual situation." We see no good faith in Mr. Meehan's opinion that 29 CFR 1926.451 did not require guardrails other than on the back sides of the scaffold in question. Mr. Meehan's theory that the presence of supporting stirrups eliminates the need for railings at the ends of two-point suspension scaffolds is in clear disregard of the requirements of 29 CFR 1926.451(i)(11) that open ends be guarded, and renders the standards meaningless if his interpretation is to prevail. Mr. Meehan, respondent's supervisory representative, is in bad faith in having his employees work without proper guardrails where a scaffold is held away from the building which leaves a gap through which one of his employees can fall. He is in especially bad faith after

having such an employee fall previously, and, having gone through the explanatory matter with the compliance officers following this incident (in particular having the standard explained to him and the need for conforming to it).

The need for guardrails is not new. The construction industry has long recognized such a need as evidenced by section 7.7 of the USA Standard, Safety Code for Building Construction (exhibit G-15) which was first published June 7, 1944. This standard held that:

> The hangers (of swinging scaffolds) shall be so designed as to support guardrails, intermediate rails, and toeboards *on both sides of the platforms when the nature of the work requires such protection.* (emphasis added)

We note also that Mr. Meehan gave repeated assurances of future compliance to the Area Director, after the requirements for the placement of guardrails were explained to him in detail (T. 159, 161). He subsequently intentionally disregarded what he now calls the Area Director's interpretation of the standards.

Respondent is in error in his theory that toeboards are not necessary. Toeboards were absent from *all* sides and ends of *all* of the cited scaffolds. The requirement of 29 CFR 1926.451(i)(9) that such scaffolds *shall be securely lashed* is unequivocal.

One good illustration of respondent and his supervisory employees' complete disregard of the requirements of the standards is Mr. Knapp (respondent's job superintendent) stating that he saw no need to lash the scaffolds to the building, and, for that reason he did not do so (T. 244) even though a certain amount of movement is inevitable (T. 225).

It is to be noted that respondent was still found to be violating these requirements in all inspections.

29 CFR 1926.451(i)(8) very definitely states that each employee "*shall* be protected" by safety belt and lifeline. Respondent attempted to characterize this violation as an individual dereliction on part of the working foreman, Mr. Halverson. Respondent stated that his authority was such that he "ran the job while Bob Knapp was gone" (T. 235). He was left in charge of enforcing the safety requirements in Mr. Knapp's absence (T. 239) and was given the job of constructing and rigging the scaffolds in question without any specific instructions from Mr. Knapp (T. 215-216).

We have previously held that, however small his authority, his supervisory designation (acting foreman) made his knowledge the knowledge of the corporation, and, his act ". . . an act for the corporation." (Secretary v. Iowa Southern Utilities Co., OSAHRC Docket 9295 (review directed May 21, 1975). Therefore, Halverson's intentional disregard of the lifeline requirement must be and is imputed to the corporate respondent. This was also stated in *Dye, supra*:

> We find no merit in the further contention that the corporation cannot be guilty of willfulness based on the acts, conduct and inferentially the states of mind of the employees. * * * The cases recognize that corporations are responsible for the acts and omissions of their authorized agents acting in the scope of their employment. There is no doubt as to the authority of the superintendent, the foreman and the backhoe operator.

Also see *F. X. Messina Construction Corp., supra,* 8 OSAHRC 852 (1974).

Corporations and other associations can be guilty of "knowing" or "willful" violations of regulatory statutes through the doctrine of *respondeat superior, U.S.* v. *A & P Trucking Company,* 358 U.S. 123, 1958. In line with these and other decisions, the Commission has imputed the knowledge and acts of foremen and superintendents to corporate respondents on a number of occasions. *Secretary* v. *McDevitt & Street, Inc.,* 8 OSAHRC 8 (1974); *Secretary* v. *C. N. Flagg & Co., Inc.,* 11 OSAHRC 632 (1974); *Secretary* v. *New Bedford Gas & Edison Light Company, Inc.,* 8 OSAHRC 701 (1974) and *Secretary* v. *Floyd S. Pike Electrical Contractor, Inc.,* 15 OSAHRC 302 (1975).

Respondent's argument that 29 CFR 1926.451(a)(4) is vague and ambiguous is without merit.

There is considerable more testimony which we will not cover in detail. It generally sustains the proposition that the respondent willfully disregarded the Act, and in fact conducted itself in almost childlike stubborn resistance to conforming to the standards which are necessary for the protection of its employees' safety. Respondent insists that it is trying to interpret the Act its way, and, disregards the accumulative wisdom of the experts in the field who, through the years, created the standards that we are presently dealing with.

We note that respondent in its brief (page 23) admits that its employees were violating the standards published in 29 CFR 1926.451(i)(8) at the time of July 11, 1974, inspection by the compliance officers; and further, Western affirmatively states that its employees were violating Western safety rules and regulations. We note also that this is a continuous proposition apparently with Western. Their attempt to lay it all on their employees is without merit. The very fact that they made a scaffolding without

the proper safeguards and had it for use the day in question would indicate a willful disregard of the standard on the part of respondent.

On page 24 of respondent's brief is the statement that the intention of the working foreman, who was in charge during the absence of the field superintendent, was to get the lifelines rigged and have all employees working from the two-point suspension scaffolds protected by safety belts secured to the lifelines. However, the working foreman stated that he had not had time to get these goals accomplished.

The foreman, as we said before, represents the company: his acts are the acts of the company.

In the past, we have had considerable difficulty in fixing a penalty because of various factors involving good faith, etc. In this case, we feel there is absolutely no showing of good faith, and there is a history of repeated conduct in violation of the Act.

We have considered the gravity of the violation, the complete lack of faith on part of the respondent, prior history and size of the employer. Also, we have very carefully considered the total credible, probative evidence and have concluded that the $9000 penalty for willful violation is appropriate and we will so find.

FINDINGS OF FACT

1. The parties stipulated that there was a previous proceeding involving the same parties designated OSAHRC Docket 1087, in which, among other things, it was alleged that respondent was in violation of 29 CFR 1926.451(i)(11) by failing to have guardrails and midrails on open sides and ends of a two-point suspension scaffold (T. 6).

2. An OSHA compliance officer, Bruce Carl Beelman, made an inspection of respondent's worksite on July 11, 1974.

3. The compliance officer met with Mr. Halverson, a supervisory employee of respondent, Mr. Halverson contacted his immediate supervisor and thereafter went on an inspection of the worksite (T. 22, 23).

4. At the time of inspection, Mr. Halverson stated that there were no safety belts and lifelines available for respondent's employees on the job site (T. 24).

5. The compliance officer discussed with Mr. Halverson the alleged violations existing where the employees were not provided with safety belts and lifelines attached to the structure of the building, also an alleged violation concerning intermediate rail, toeboard and guards on the end and open sides of the two-point suspension scaffolds (T. 24).

6. The compliance officer took photographs of the suspended scaffolding at the time of inspection (exhibit G-5, T. 25).

7. Exhibit G-5 portrays a two-point suspension scaffold directly above the main entrance door of the Grace Bible Institute on the west exterior portion of the building, the worksite of respondent. This photo shows that there is a top rail provided, but no intermediate rail or toeboard (T. 25).

8. G-5 portrays the west side of the building. The scaffold was approximately 47 feet high from the ground level, or about four floors (T. 26). One employee was observed working on this scaffold, sandblasting. This employee was not equipped with a safety belt. At the time of the observation, this employee exited the right end

of the scaffold and climbed onto the roof in through the window shown on the left portion of exhibit G-5 (T. 27). There was a distance of approximately 12 to 16 inches from the edge of the scaffold to the exterior portion of the building on the front side of the scaffold (T. 29).

9. *There was a very good possibility that an employee could fall into this open space between the front edge of the scaffold and the exterior portion of the building* (T. 29, G-5).

10. The compliance officer took a picture (G-6) of an employee operating from a two-point suspension scaffold on the north wing who was performing sandblasting operations and working at an approximate height of 17 feet from ground level (T. 30). The scaffold shown at the west end of the building (T. 30-31). Exhibit G-6, in the upper right-hand corner portion shows another portion of the scaffold on the south side of the north wing approximately 23 feet above ground level (3rd story level). This scaffold was not equipped with a midrail. There were no guardrails or midrails on either end of the scaffold on the north wing nor was it equipped with toeboards (T. 31). After the picture was taken, the compliance officer observed an employee exiting through a window on the third floor to the scaffold (G-6). This employee was not equipped with a safety belt and was approximately 17 feet above ground level (top of the 2nd story). This scaffold was equipped with a top rail on the back portion and not equipped with a midrail or standard guardrails for the ends or front portion (T. 32). Extension arms were provided on this particular scaffold which left the scaffold approximately 12 to 18 inches from the exterior portion of the building. The employee on the scaffold was not equipped with a safety belt nor a lifeline. The distance from the scaffold to the building was wide enough for a man to fall through (G-6, T. 33).

11. The compliance officer on the date of inspection observed two employees working from a two-point suspension scaffold on the north side of the north wing, at an approximate height of 23 feet from ground level. This scaffold was equipped with a top rail at the back side of the platform, no handrails or midrails on the back side or toeboards. These employees were not equipped with safety belts or lifelines (G-7, T. 34).

12. On the north scaffold of the north wing, there were five-gallon buckets in containers on the platform of the scaffold. These scaffolds were not lashed to the building in any way (T. 35, G-7).

13. Respondent's employees were wearing visual protective devices consisting of a sandblasting hood with an opening in the front portion for visual purposes (T. 37). These hoods limited the employees' vision partially for the reason there would be no peripheral vision on either side. If an employee had to look down, he would have to bend all the way down to see anything below him (T. 38).

14. Approximately five of respondent's employees were affected by all of these violations of the standard.

15. Following the July 11, 1974, inspection, Mr. Beelman explained to Mr. Halverson that all of the scaffolds in use on the project appeared to be in violation of the requirements for guardrails, intermediate rails and toeboards, the requirement that they be properly lashed to the building, and that employees working from them should, according to the standards, be provided with safety belts and attached lifelines (T. 42). The following day, the compliance officer returned to the jobsite and found its employees had been equipped with safety belts and lifelines but the scaffolds were in use in the same manner without any additional guardrails being installed (T. 50).

16. Citations were issued on July 17, 1974, to Mr. Harvey Meehan, respondent's branch manager in Omaha, detailing the alleged violations previously explained to Mr. Halverson.

17. However, on September 24th, at another Omaha jobsite, the company was again observed using a two-point suspension scaffold with unguarded ends and failing to lash them to the building (T. 43-47, exhibits G-8, G-9).

18. Respondent's supervisory officials were aware of the scaffolding standards long before the July 11th inspection because respondent's Omaha Branch had previously been cited on June 19, 1972, under 29 CFR 1926.451(i)(11) for failure to provide a similar two-point suspension scaffold with guardrails, midrails and toeboards at all open sides and ends and under 29 CFR 1926.451(i)(8) for having an employee on the same scaffold whose lifeline was not attached. The scaffold involved in the previous citations (exhibit G-10 through G-15) entirely lacked guardrails at its ends which were open and along the side adjacent to the building face where it was held some distance away from the building by vertical pillars. These citations were issued following a fatal accident in which an employee of respondents fell through the open space between the scaffold and the building (see appendix B to G-3, and Mr. Meehan's testimony in OSAHRC Docket 1087, page 136 of exhibit G-16).

19. The merits of these early citations were never decided in the notice of contest proceeding which followed for the reason that the citations were vacated on procedural grounds by order of the Review Commission Judge. (Secretary v. Western Waterproofing Company, OSAHRC Docket 1087. Review of that order was directed by the Commission on May 15, 1974, and is still pending.)

20. *Respondent's Omaha manager had personal knowledge of the provisions of 29 CFR 1926.451, including the requirements of two-point suspension scaffolds being securely lashed to the building, well in advance of the issuance of the June 19, 1972, citation* (see Mr. Meehan's testimony in Docket 1087, pages 127, 132, 133 (exhibit G-16)).

21. *In spite of this, he testified that as of June 11, 1974, guardrails were intentionally omitted from the front and ends of the scaffolds in question in the instant case* (T. 193). *He said this omission was consistent with the company's safety policy* (T. 194). *He further testified that the space between the face of the building and the scaffold shown in exhibit G-6 was sufficient for an employee to fall through* (T. 196) *as was a similar space shown in exhibit G-5* (T. 199) and a space through which previously his employee fell to his death (T. 199, exhibit G-11). Despite all of this, Mr. Meehan would not consider these sides to be open and thus would not guard them with railings or otherwise (T. 196, 200).

22. *Mr. Meehan admitted that the end of the scaffold above the main entrance (exhibit G-5) from which Mr. Beelman observed an employee climbing on the roof, was "open"* (T. 195).

23. In respect to item 1 of the citation for nonserious violation, evidence indicates that it is standard procedure for compliance officers to inquire as to the means of fire protection available at each construction worksite inspected, that Mr. Halverson was asked what fire protection measures he had available. Mr. Halverson informed the compliance officer that he, "did not have anything" in regard to fire protection measures available or fire extinguishers present (T. 90-91).

24. Where the building wall is not there to protect workers from falling (as was true with the scaffold above the entrance which was held away from the building by the eaves (exhibit G-5) scaffold on the west side of the north wing (exhibit G-6)) such spaces open away from the building and they constitute an open side of the scaffold.

CONCLUSIONS OF LAW

1. Respondent is, and at all times material hereto, was an employer engaged in a business affecting commerce within the meaning of the Act.

2. Jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

3. Respondent violated item 1 of the citation for nonserious violation.

4. Respondent violated 29 CFR 1926.451(i)(8), .451(i)(9) and .451(a)(4) as alleged in the complaint and said violations were willful within the meaning of section 17(a) of the Act.

5. The Secretary's proposed penalties of $90 and $9000 respectively for said nonserious and willful violations are appropriate under section 17(j) of the Act.

6. Mr. Meehan's testimony of failure to provide guardrails on the ends and front sides of the scaffolds in question was intentional and not the result of any dereliction on Mr. Halverson's part.

7. Respondent through its foreman and supervisory employees made a conscious, intentional, deliberate, voluntary decision to leave off midrails, handrails, and toeboards, thereby failing to protect open sides.

8. Respondent was not in good faith in its actions which failed to provide guardrails, midrails, toeboards and rails on open ends of the scaffolds.

9. The presence of supporting stirrups does not constitute guardrails, midrails and toeboards within the meaning of 29 CFR 1926.451 (i) (11) that open ends be guarded.

10. Failure on part of respondent to provide safety belts and lifelines was willful and intentional.

11. The knowledge, of the various supervisory personnel who failed to provide guardrails, end guardrails, midrails and toeboards on open spaces, is the knowledge and will of the respondent corporation and such failure to provide the protections that the standards require is a willful act on part of the respondent.

DECISION

Based upon the findings of fact and conclusions of law, the credible, probative and substantial evidence of record, it is hereby ORDERED:

1. Upon motion of the Secretary, item 2 of the citation for nonserious violation is vacated.

2. Item 1 of the citation for nonserious violation and its proposed penalty of $90 are affirmed.

3. The citation for willful violation is affirmed.

4. The penalty for willful violation is $9000.

/s/ Vernon Riehl
Vernon Riehl, Judge, OSAHRC

Date: August 11, 1975

APPENDIX D

Public Law 91-596
91st Congress, S. 2193
December 29, 1970

PENALTIES

Sec. 17. (a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation.

(b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Any employer who has received a citation for a violation of the requirements of section 5 of this Act, of any standard, rule, or order promulgated pursuant to section 6 of this Act, or of regulations prescribed pursuant to this Act, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 10 initiated by the employer in good faith and not solely for delay or avoidance of penalties), may

be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h)(1) Section 1114 of title 18, United States Code, is hereby amended by striking out "designated by the Secretary of Health, Education, and Welfare to conduct investigations, or inspections under the Federal Food, Drug, and Cosmetic Act" and inserting in lieu thereof "or of the Department of Labor assigned to perform investigative, inspection, or law enforcement functions".

(2) Notwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title, kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection, and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life.

(i) Any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to $1,000 for each violation.

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(l) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

APPENDIX E

29 CFR 1926.451(a)(4):

"(4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform."

29 CFR 1926.451(i)(8):

"(8) On suspension scaffolds designed for a working load of 500 pounds, no more than two men shall be permitted to work at one time. On suspension scaffolds with a working load of 750 pounds, no more than three men shall be permitted to work at one time. Each employee shall be protected by an approved safety life belt attached to a lifeline. The lifeline shall be securely attached to substantial members of the structure (not scaffold), or to securely rigged lines, which will safely suspend the employee in case of a fall. In order to keep the lifeline continuously attached, with a minimum of slack, to a fixed structure, the attachment point of the lifeline shall be appropriately changed as the work progresses."

29 CFR 1926.451(i)(9):

"(9) Two-point suspension scaffolds shall be securely lashed to the building or structure to prevent them from swaying. Window cleaners' anchors shall not be used for this purpose."

29 CFR 1926.451(i)(11):

"(11) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), approximately 42 inches high, with a midrail, and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section."